Land Sales Act 1984 (Qld)
Trust Arrangement Skirts Statutory Prohibition

The Queensland Court of Appeal (McPherson JA, Williams JA and Jerrard JA) recently considered the operation of a particular provision of the *Land Sales Act 1984* (Qld). The decision in *Francis & Others v NPD Property Development P/L* [2004] QCA 343 will be of considerable interest to all Queensland property practitioners.

Land Sales Act 1984 (Qld) ('the Act')

Section 8(1) of the Act currently provides that a proposed allotment of freehold land may only be sold if a specified development permit is in effect (although the Act employed different language when this dispute arose, the change in statutory language is not material to the conclusion reached). An agreement made in contravention of s 8(1) is void.

Background

A number of individual sellers entered into written contracts with NPD Property Development Pty Ltd, as buyer, to sell land. There were in all six contracts each in the standard printed form supplemented by sets of special conditions. In the case of some of the contracts those conditions varied slightly but not so much as to prevent them from being considered together.

The subject land, comprising six separate registered lots, was previously used for farming activities. The buyer was a developer acquiring the land with a view to its being reconfigured and sold as residential allotments. The difficulty, which is a not unfamiliar one, was that each of the sellers wished to retain their house and its curtilage (the Seller's Block, as it was called in the contracts). The problem which this presented for the buyer was that the process of excising those blocks from the larger areas being sold to it involved a reconfiguration which could only be effected pursuant to a plan of survey approved by the relevant local government and registered in compliance with the provisions of the *Land Title Act 1994* (Qld). It was not in dispute that at the time the buyer entered upon the purchase of each of the subject allotments there was not in force within the meaning of s 8(1)(a) of the Act any local government approval (the wording then used in the Act) of the contemplated reconfiguration involved in excising the Seller's Block from the whole of the individual seller's registered lot.

The solution adopted by those who drew the contracts was for the seller under each contract to agree to transfer to the buyer the whole of their existing registered lot on terms that they continued to retain equitable ownership of the Seller's Block, to which title would be reconveyed to them once the overall plan of reconfiguration was registered. For this purpose, a clause in the Special Conditions provided that for the purposes of the conveyance of the property —

… it is agreed that the seller shall continue to retain equitable ownership of the Seller's block notwithstanding the completion of this contract and subject to the provisions as hereinafter appear. To facilitate the subdivision of the land by the buyer, it is agreed that the bare legal estate of the Seller's Block shall be transferred to the buyer, who agrees to hold the same on behalf of the seller pursuant to the terms of this contract ….

Upon the recording of a separate instrument of title for the Seller's Block, the clause provided for transfer to the seller of the 'bare legal title' to that block.

As noted by McPherson JA, in contracting on these terms the parties evidently proceeded on two assumptions. First, that an absolute owner of land in fee simple holds two estates, one of which is legal and the other equitable; and secondly that it is possible under the Torrens system to transfer only the bare legal title to such land. Both these assumptions were legally unfounded.

The common question for determination on these appeals was whether the trial judge, Muir J, who heard all six applications together, was correct in holding that the contracts contravened the provisions of s 8(1) of the Act and so were, as he declared, void by force of s 8(2) of the Act. Justice Muir's first instance decision was *Francis & Anor v NPD Development P/L* [2004] QSC 202.

The Issue

The critical issue was whether the contract in each case amounted to selling a proposed allotment (namely the Seller's Block) without the requisite approval under s 8(1) of the Act. If the commercial transaction contemplated by the contracts involved a **sale** of a proposed allotment in contravention of the legislation the contracts would be void.

Separate judgments were delivered:

McPherson JA

Before considering the position under the Act, McPherson JA thought it helpful to consider the position as it would be if the contract in each case were to be carried out by transferring to the buyer the title in fee simple of each of the sellers to the whole of the land comprised in their existing registered lots. In these circumstances, McPherson JA opined that the result would be that the buyer would hold the whole of the transferred land subject to a trust to reconfigure and transfer the Seller's Block to the seller when the whole area was reconfigured, and in the meantime to permit the seller to remain in occupation. Any attempt by the buyer to rely upon the indefeasibility of its superficially clear title to the whole area would be subject to the exception in s 185(1)(a) of the *Land Title Act 1994* (Qld), if not also to s 185(3)(b). It was probably correct to say that the sellers' interests in the Seller's Blocks would be protected by an equitable charge over the whole of the land to secure the performance of the trusts in their favour.

In order to assess the impact of the provisions of the Act, McPherson JA then considered if the individual contracts amounted to selling a proposed allotment as contemplated by the Act. Contrary to the conclusion reached by the trial judge, McPherson JA did not characterize the contracts, in so far as they obliged the buyer to transfer the Seller's Block, as an agreement for the sale of the Seller's Block. There were several reasons why McPherson JA did not consider that this conclusion should be adopted.

First, the process of retransferring the Seller's Block did not resemble a sale according to ordinary conceptions of that word. It was simply the revesting in the original registered proprietors of title to a portion of the land which the parties never at any time intended should become beneficially the property of the buyer.

Further, although individual case authorities as to the meaning of 'sell' or 'sale' could not be decisive, McPherson JA noted that the primary meaning of 'sale', as accorded by the courts, was the conveyance or transfer of something in return for money. By contrast, in the present case, although there was a sale to the buyer of the whole area of the existing registered land in its un-reconfigured condition, McPherson JA accepted the submission that there was no 'sale' in the primary sense by the buyer to the sellers of the Seller's Blocks. It was not a transfer in return for money but, rather, in satisfaction of the equitable obligation resting upon the buyer to carry out the terms of the express trust to retransfer the Seller's Block in each case. The process of retransferring the Seller's Block was not a sale but the specific performance of an express trust imposed by the parties on the buyer. To state it in another way, the proprietary right of the seller as beneficiary under the trust of the whole of the land was to be carried into effect by the buyer's act of transferring to the seller title to the Seller's Block once it became available upon registration of the plan of survey incorporating the approved reconfiguration.

For these reasons, McPherson JA was satisfied that the obligation of the buyer to retransfer to the sellers the title to the Seller's Block did not amount to selling that block within the meaning of s 8(1) so as to render the transaction void by force of s 8(2).

For the sellers, it was nevertheless submitted that if one stood back and looked at what was taking place, it was clear that the purpose of the agreements between the buyer and sellers was to subdivide and sell the whole area of land by excising the Seller's Block in each case, and that this offended the prohibition in s 8(1). Once again, this argument was not accepted.

McPherson JA noted that one of the objects of the Act is to protect the interests of consumers in relation to property development. While the expression 'consumer' is not defined, it is one that, at least since the enactment of the *Trade Practices Act 1974* (Cth), has entered common usage as a means of designating members of the general public who acquire the

benefit of goods and services from suppliers. McPherson JA stated that it was not altogether easy to conceive of the terminology extending to those who, like the sellers in this case, were the suppliers of the commodity (land). A compelling, though perhaps not decisive, consideration in support of this view is to be found in s 29 of the Act. It deals with the position, to quote the terms of s 29(1), 'Where a purchaser has avoided an instrument pursuant to this part', by providing that 'any person who … has received money paid by or on behalf of the purchaser shall … forthwith refund the amount of that money to the purchaser …'. Section 29(2) confers on the person entitled to a refund under the section a right to recover the money by action as for a debt due. As there is no corresponding provision in the Act with respect to sellers, this suggested to McPherson JA that they were not the particular object of the legislature's concern when, in enacting the statute, it used the word 'consumers'.

In McPherson JA's opinion the legislation was not designed or needed to protect the interests of persons like the sellers in this case and s 8(1) should not be so broadly construed as to provide such protection.

Williams JA

Williams JA was also prepared to adopt the reasoning of McPherson JA but first needed to be satisfied that this was in accordance with the contractual intention of the parties. The difficulty arose due the manner of contractual drafting. Due, in part, to certain unfounded legal premises (as previously referred to) the drafting of the contracts contained inconsistencies. In part, the contracts contemplated a sale of all the land whilst also purporting to reserve the Seller's Blocks from the ambit of the sale.

Notwithstanding the use of ineloquent contractual language, Williams JA opined that the intention of the parties was clear. The intention of the parties, evidenced by the contract they entered into read as a whole, was that the whole of the existing registered lots should be transferred to the buyer to be held on trust to reconvey at the appropriate time to the individual sellers the Seller's Block. For this reason, notwithstanding the inconsistencies in the terms of the contract and the use therein of inappropriate expressions the consequences in law of the documentation were as described by McPherson JA.

Jerrard JA (dissenting)

Jerrard JA respectfully differed from the conclusion reached by McPherson JA and Williams JA. Jerrard JA considered that the agreement the parties made to convey title to the Seller's Block, when available for transfer, was no different from the position which would apply if the buyer had agreed to a future transfer of title, not to the Seller's Block, but to an allotment to be excised from a quite different area of land held by the buyer. The position would be that a promise by the buyer to transfer the title to a proposed allotment was offered and accepted as part of the consideration for the transfer of the title to the whole of the existing registered lot.

In Jerrard JA's view, the sellers agreed to take a promised transfer in the future of title to a proposed allotment, (the Seller's Block) together with a substantial sum of money, in consideration for the immediate transfer of the title to their existing registered lot. Jerrard JA considered that the buyer agreed to sell them the proposed allotment (the Seller's Block) as part of the buyer's consideration for the purchase of the existing registered lot. The contract was intended to bind the sellers to accept the transfer of the Seller's Block as part of that consideration. They accordingly entered upon the purchase of a proposed allotment and the agreement by the buyer to sell it to them was caught by s 8(1) of the Act and made void by s 8(2).

In adopting this approach, Jerrard JA expressly acknowledged that he was giving the words 'sale' and 'sell' a wider construction than McPherson JA preferred. While Jerrard JA acknowledged that in *Chan v Dainford Ltd* (1985) 155 CLR 533 at 537 the joint judgment of the High Court observed that the primary meaning of 'sale' is an exchange of property, the subject of the sale, for money, he also noted that this prima facie meaning was not declared by the High Court to be an exclusive one, and that it was common enough to read advertisements of offers to accept, for example, a boat or an apartment in the city, in payment or part payment for the sale of small farm or a house in a rural town. The parties to those transactions would say they were selling the farm or country town house for a boat or a unit, and vice versa.

Accordingly, the term 'sell' was used in the community, and appropriate, to describe the exchange of title to real property for money and title to other real property, which is what the sellers agreed to do. Applying that secondary or extended meaning to 'agree to sell' in the Act was not precluded by the term 'sell' having a narrower primary and everyday meaning. Nor did Jerrard JA consider the fact of its primary or more common meaning excluded the use of the term 'sell', or the construction of it in the Act, to describe the transfer of title to real property, together with money, for title to other real property.

Jerrard JA characterized the agreements in question as being an exchange of title to land for consideration, which consideration included the conveyance in the future of title to different land. Although expressly acknowledging that it may seem curious to describe the transfer of title, when that occurs, to the beneficiaries (the sellers) without payment at that stage of any consideration by them as a purchase, in Jerrard JA's view that transfer would be the completion of the process by which that title was agreed to be transferred as consideration.

Comment

Whilst the majority decision of McPherson JA and Williams JA may be viewed by property practitioners as a sensible resolution of a difficult problem, the adoption of a narrower interpretation of 'sell' in the context of remedial legislation was clearly a conclusion that did not sit comfortably with Jerrard JA. Notwithstanding these reservations, the decision will be of interest to property practitioners who need to consider ways with which to deal with a

situation that is not directly contemplated by the terms of the Act but is nevertheless not uncommon in its occurrence. To adopt the words of McPherson JA, by casting the buyer's obligation in terms of an express trust to retransfer a portion of the existing registered lot, the parties may succeed in eluding the prohibition imposed by section 8(1) of the Act.

Consistent with the result in *Francis & Others v NPD Property Development P/L*, a carefully drafted contract may provide for a transfer of the title to an existing registered lot from the seller to the buyer with the buyer agreeing to hold that land on trust to transfer a portion to the seller. In this way, as McPherson JA expressly indicated in his reasons, s 8(1) of the Act would not apply to the initial transfer being simply the transfer of an existing registered lot (rather than a proposed allotment), nor would the transfer of the excised portion back to the seller be caught by the statutory provision as that transfer would merely constitute the carrying out of an obligation imposed on the buyer by the trust rather than being the sale of a proposed allotment.

Of course, this is not the only means of dealing with the particular problem encountered in this instance. A developer could proceed by way of a 2 stage reconfiguration with the first stage being a two lot reconfiguration to create title to the area of land to be transferred to the seller and a separate title for the balance area of land. The second stage would involve the further reconfiguration of the land into the number of lots desired. The contract for purchase of the seller's land, in addition to providing for the reconfiguration, would be made subject to gaining an exemption under s 19 of the Act (which is permissible as the first stage of the proposed reconfiguration involves not more than 5 proposed allotments).

Notwithstanding that a 2 stage reconfiguration (subject to gaining an exemption under the Act) provides an existing means of dealing with this particular problem, circumstances may arise where (for whatever reason) it is not proposed to proceed in this manner. In these circumstances, the trust arrangement sanctioned by the Court of Appeal provides a further possible solution.

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Land Sales Act 1984 (Qld)
The Time Limit for an Application for Exemption

The decision of Wilson J in *Wan and Ors v NPD Property Development Pty Ltd* [2004] QSC 232 also concerned the operation of the *Land Sales Act 1984* (Qld) ('the Act').

As previously noted, s 8(1) of the Act provides that a proposed allotment of freehold land might be sold only in certain circumstances. An agreement made in contravention of s 8(1) is void. Section 19 allows a purchaser (and others) to apply for an exemption from any of the provisions of Pt 2. By s 19(6), notwithstanding s 8, a person may agree to sell a proposed allotment if the instrument that binds a person to purchase the proposed allotment is conditional upon the grant of an exemption. By s 19(7) an application for exemption must be made 'within 30 days after the event that marks the entry of a purchaser upon the purchase of the proposed allotment.'

The Question for Determination

The nub of the problem was the meaning of the statutory expression 'the event that marks the entry of the purchaser upon the purchase of the proposed allotment.' The seller submitted that the statutory reference was to the date the contract was made. As the buyer did not apply for the exemption within 30 days of the day of the contract, the seller submitted that the contract was void. For the buyer, it was submitted that the statutory reference was to the point at which the buyer was bound to purchase and that point was not reached until any conditions precedent were satisfied or waived. On this basis, the buyer argued that its application for exemption was made within time.

The Decision

Wilson J held that a person who signs an instrument intended to bind the signatory to purchase (whether it is intended to bind that person absolutely or conditionally) is taken to have entered upon a purchase for the purpose of the legislation. The signing of the contract is the relevant event. The fact that contractual conditions remain to be fulfilled does not change the result. Accordingly, as the application for exemption was not made within 30 days of the contract date, the contract was void.

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